LIBRARY
SUPREME COURT, U. S.

72-1715

No.

FILED
JUN 18 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

HARRY DEAKTOR and EDITH DEAKTOR,
and E. D. FOODS, INC., a Pennsylvania corporation,
Petitioners,

v.

FOX GROCERY COMPANY, a Pennsylvania corporation,
and JOHN F. FOX,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit
And
Request For Summary Reversal

JAMES H. McCONOMY
JOHN McN. CRAMER
JOHN C. UNKOVIC
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pa. 15219

Attorneys for Petitioners.

June, 1973

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 10

Appendix A—Judgments and Opinions Below

(1) U. S. District Court's Opinion on Motion for Summary Judgment 11

(2) U. S. District Court's Oral Decision on Motion for Directed Verdict 25

(3) U. S. District Court's Order Directing Judgment to be Entered in Favor of Defendants . . . 27

(4) Opinion of Third Circuit Court of Appeals Affirming Judgment 28

(5) Order of the Third Circuit Court of Appeals Affirming Judgment in Favor of Defendants 36

(6) Order of the Third Circuit Court of Appeals Denying Plaintiffs' Petition for Rehearing 37

Appendix B—Constitutional Provisions and Statutes Involved 38

AUTHORITIES

CASES: PAGE

Albrecht v. Herald Co., 390 U.S. 145 (1968) 8
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 8
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 9
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 8
Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F. 2d 1080 (7th Cir. 1970), cert. denied, 401 U.S. 923 (1971) 8
Kridler v. Bituminous Casualty Corp., 409 F. 2d 88 (5th Cir. 1969) 9
Lavender v. Kurn, 327 U.S. 654 (1946) 9
Siegal v. Chicken Delight, Inc., 311 F. Supp. 847 (N. D. Cal. 1970), aff'd with regard to liability, 448 F. 2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972) . 8
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 8
Union Carbide & Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962), petition for cert. dismissed, 371 U.S. 801 (1962) 8
Washington State Bowling Proprietors Ass'n. Inc. v. Pacific Lanes, Inc., 356 F. 2d 371 (9th Cir. 1966), cert. denied, 384 U.S. 963 (1966) 8
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 8,9

CONSTITUTIONAL PROVISION:

United States Constitution:

Seventh Amendment 3

STATUTES:

Federal Statues:

Sherman Anti-Trust Act § (26 Stat. 209), as amended 15 U.S.C. § 1 3

PAGE

Clayton Anti-Trust Act §3 (38 Stat. 731), 15 U.S.C. §14 3
Clayton Anti-Trust Act §4 (38 Stat. 731), 15 U.S.C. §15 3,9
Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. §1254 (1) 2

IN THE

Supreme Court of the United States

October Term, 1972

HARRY DEAKTOR and EDITH DEAKTOR,
and E. D. FOODS, INC., a Pennsylvania corporation,
Petitioners,

v.

FOX GROCERY COMPANY, a Pennsylvania corporation,
and JOHN F. FOX,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit
And
Request For Summary Reversal

Petitioners, Harry and Edith Deaktor and E. D. Foods, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 27, 1973 and request that this Court summarily reverse the decision of the Court of Appeals.

OPINIONS BELOW

There was no formal opinion of the District Court on the motion for a directed verdict which is the source of the questions presented by this Petition. Excerpts from the transcript in that court, including the judge's statement on granting the directed verdict, are reproduced in Appendix A to this Petition at page 25. The opinion of the District Court on pretrial motions is reported at 332 F. Supp. 536, and is reproduced in Appendix A to this Petition at page 11.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition at page 28.

JURISDICTION

The judgment of the Court of Appeals (p. 36, Appendix A, *infra*) was entered on March 27, 1973. A timely petition for rehearing was denied on May 2, 1973 (p. 37, Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Whether a verdict was properly directed in favor of Defendants at the close of Plaintiffs case on the ground that Plaintiffs had failed to present sufficient evidence to enable a jury to decide that a causal connection existed between the antitrust violations of Defendants and injury to the supermarket corporation, E. D. Foods, Inc., where Plaintiff, Harry Deaktor, the operator of the supermarket, who was permitted to testify both as a fact witness and as an expert, testified that in the absence of the restraints imposed upon the operation of the supermarket by Defendants, its net profits would have been increased.

2. Whether a verdict was properly directed in favor of Defendants at the close of Plaintiffs' case on the ground that proof as to the amount of damages suffered by the supermarket

corporation, E. D. Foods, Inc., was too speculative to support a jury verdict where Harry Deaktor, the operator of the supermarket, who was permitted to testify as an expert, gave testimony which quantified the damage to net profits of the supermarket corporation, E. D. Foods, Inc., on the basis of its actual expenses and sales volume and his experience operating another supermarket in the same neighborhood for a period of over six years ending when he left that supermarket to open the store in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Seventh Amendment to the Constitution of the United States, Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 4 of the Clayton Act, 15 U.S.C. § 15. These provisions are reproduced in pertinent part in Appendix B, p. 38, *infra.*

STATEMENT OF THE CASE

The questions presented in this Petition arise out of a suit based on Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, by the owner and operators of a franchised retail food supermarket against the food wholesaler who had granted the franchise. Defendant, Fox Grocery Company, (hereinafter "Fox"), a food wholesaler, is the entity authorized to grant franchises for the operation of "Foodland" retail supermarkets in Western Pennsylvania, West Virginia and Maryland. Defendant, John F. Fox is President of Fox Grocery Company. Harry Deaktor and Edith Deaktor, his wife, at all times relevant to this action were 49% shareholders of E. D. Foods, Inc. and operated a supermarket under a "Foodland" franchise granted by Fox. Fox at all times relevant to this action was a 51% stockholder of E. D. Foods, Inc. and now claims to be the sole stockholder. The Deaktors were, and are with Fox, guarantors of the debt of E. D. Foods, Inc., which is secured by a pledge of the personal assets of the Deaktors.

Statement of Case.

Plaintiff, Harry Deaktor was an experienced supermarket operator in the neighborhood of the City of Pittsburgh where the Foodland store owned by E. D. Foods, Inc. was located (hereinafter the store in question will be referred to as "Deaktors' Foodland" or "the Store"). He operated Deaktors' Foodland from late November, 1966 to March 17, 1968, when the Deaktors were ousted from the Store by Defendants. During the period that Mr. Deaktor operated the Store, the maximum prices for most items sold in the Store were set by Defendants. Likewise, the Store was required to buy its meat from Fox and its produce from a wholly-owned subsidiary of Fox. "Service charges" in addition to the price of the meat and produce were imposed by Fox in connection with these transactions. During the period the Store was operated by Mr. Deaktor, it showed a net loss according to its books which were kept by Fox. Following their ouster from the Store, the Deaktors filed suit on their own behalf and on behalf of the corporation alleging that in the absence of the restrictions imposed on the operation of Deaktors' Foodland by Defendants, the net profits would have been increased. (At the very least, net losses would have been reduced.) Certain aspects of their claims were dismissed on pretrial motions to dismiss and for summary judgment. The case came on for trial in the United States District Court for the Western District of Pennsylvania. At the close of Plaintiffs' case, the Defendants moved for a directed verdict on the ground that the evidence of damage offered by Plaintiffs was insufficient to raise a question for a jury. The Court granted the motion on the grounds that:

> "The evidence as to causal connection between the alleged antitrust violations and the damages which it is alleged E. D. Foods suffered is too speculative to submit to the jury, and that the evidence as to the alleged damages suffered by E. D. Foods is too speculative to submit it to the jury."

The Court of Appeals for the Third Circuit affirmed this decision by the trial judge on March 27, 1973 and a petition for rehearing was denied on May 2, 1973.

REASONS FOR GRANTING THE WRIT

The decisions of the District Court and the Court of Appeals are inconsistent with the decisions of this Court which govern the sufficiency of proof of damages in actions under the antitrust laws of the United States. They are also inconsistent with the decisions of other Courts of Appeals.

The proof of damage offered by Plaintiffs can be summarized as follows. Harry Deaktor was the principal witness for Plaintiffs. He was qualified as an expert on the basis of his extensive practical and theoretical experience in the field of supermarket operations which included operation of a supermarket in the same neighborhood for six years immediately prior to the opening of Deaktors' Foodland. In addition, of course, he gave direct testimony from his own observations because he had been the operator of Deaktor's Foodland during the relevant period. The testimony showed that the Foodland franchise program was intended to present a low-price image through its so-called "Blitz" prices which were designed to undercut the price levels of competitive chain stores. The Blitz program relied on loss leaders and the sale of other items at low markups which did not produce sufficient revenue to cover operational expenses. After Deaktors' Foodland had been in operation a short time, Mr. Deaktor realized that under the particular circumstances of that store, an increase in retail prices was necessary to produce a net profit. When he advised representatives of Fox that he proposed to follow this course, he was told that he was not permitted to and was threatened with the loss of the Store's franchise if he followed through with his plans. This threat was consistent with an official Foodland memorandum, introduced as an exhibit at trial, which provided that:

> "All Foodland stores will utilize the #1 Blitz Pricing Structure [the lowest Blitz price structure] unless approval is given by the Foodland group to utilize Blitz #2 in a particular store."

* * * *

"Retail pricing of Tenderbest labeled beef will be established by the meat price list and followed by all stores . . . ."

* * * *

"All Foodland stores will follow the health and beauty aid discount price structure."

* * * *

"Foodland franchise may be rescinded for any infraction of this policy."

Mr. Deaktor also sought for a period to improve the profits of the Store by purchasing produce in the wholesale produce yards of the City of Pittsburgh. He did this in order to reduce the cost of produce below that charged by the wholly-owned Fox subsidiary, Green Thumb Produce Co., and to eliminate certain "service charges" that Fox imposed in connection with these produce purchases. He also sought to purchase meat through his father, a wholesale meat buyer, in an effort to reduce costs and reduce "service charges." By a letter which was introduced as a trial exhibit, Defendant, John F. Fox reprimanded Mr. Deaktor for these practices and instructed him to discontinue them.

Defendants did not challenge the sufficiency of the evidence to show that they had conspired to set the maximum prices at which Foodland stores, including the Store operated by Plaintiffs, could sell and to require Foodland stores, including the Store operated by Plaintiffs, to buy meat and produce from Fox or its designated subsidiary as a condition of using the Foodland trademark.

On the question of damages to the Store, Harry Deaktor examined the financial records prepared by Fox. These records showed that the Store operated at a gross profit margin (sales minus cost of goods sold) of 14.6% in its first fiscal year ending July 31, 1967 and 18.0% in its second fiscal year until March 17, 1968. At these margins, the Store had a net loss after expenses of $90,000 in its first fiscal year and $6,000 in its second fiscal year until March 17, 1968. Mr. Deaktor testified that at the supermarket he had operated in the same neighborhood until November, 1966 when he left to operate the Store

involved in this case, he had adjusted his retail prices to produce a gross profit margin of 21.5% and had attained net profits. He testified that if he had been free to set the prices he wished in Deaktors' Foodland, he would have structured them to obtain a gross profit margin of 21%, a lower margin than at his prior supermarket. Mr. Deaktor testified from the financial statements prepared by Fox concerning the volume of sales experienced at Deaktors' Foodland during the portions of two fiscal years involved in this case. He explained the means he would have utilized to maintain this volume of sales at an increased gross profit margin. He testified concerning his observations of the pricing structure of his competitors and that their prices were sufficiently high that he could have raised his prices and remained competitive. He testified to the amount of the increase that would have taken place in gross profits if he had been permitted to apply his pricing structure to the goods that were actually sold. He testified that if he had been free of restraint, store expenses would have remained substantially the same as those shown in the records of the Store prepared by Fox (with the exception of the elimination of certain "service charges" on meat and produce purchases which will be discussed more fully below). Therefore, he testified that net income would have been increased by the amount by which gross income would have been increased. He testified that if he had been free to operate the Store without restraint with regard to pricing, it would have had a net income in its first fiscal year of about $4,000 and a net income in its second fiscal year until March 17, 1968 of about $48,000.

Mr. Deaktor testified to the amount of "service charges" imposed on the Store by Fox for purchases of produce from Fox's subsidiary corporation, Green Thumb Produce Company and meat from Fox. These charges amounted to $8,299 for meat and $2,668 for produce the first fiscal year and $7,665 for meat and $2,407 for produce during the relevant part of the second fiscal year. He testified that if he had been free of the restraints imposed by Defendants, he could have bought equal quality products elsewhere at less cost and eliminated these "service charges" with a consequent increase in net income in addition to that which he could have obtained by departing from the Blitz pricing structure.

Plaintiffs' proof of antitrust violations amply satisfies the criteria of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and *Siegal v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N. D. Cal. 1970), *aff'd with regard to liability*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). Indeed, it is an illustration of the observation of the Court in *Albrecht* at page 152 that: " . . . schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market."

As we stated at the outset, the decisions of the District Court and the Court of Appeals are inconsistent with the prior decisions of this Court concerning proof of damage in antitrust cases dating back to *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927), and including *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).* These cases stand for two important propositions which were ignored by the courts below. The first is that in a case like the instant one, a jury:

> " . . . may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' [Citations] Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bieglow v. RKO Radio Pictures, Inc., supra,* at page 264.

---

*The decisions are also inconsistent with results reached by other courts of appeals in a host of cases including: *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F. 2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Washington State Bowling Proprietors Ass'n., Inc. v. Pacific Lanes, Inc.*, 356 F. 2d 371, 379 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966); and *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 595 (10th Cir. 1962), *petition for cert. dismissed*, 371 U.S. 801 (1962).

The second is that a plaintiff's:

> "... burden of proving the fact of damage under §4 of the Clayton Act [15 U.S.C. § 15] is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible sources of injury in fulfilling his burden of proving compensable injury under § 4. [Citations]. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* at footnote 9, page 114.

Given the evidence introduced in the instant matter and the applicable principles stated by this Court with regard to proof of damages in antitrust cases, the courts below failed to follow the teaching of this Court that:

> "In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion was made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for a directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) at footnote 6, page 696.

In the instant case, it is clear that both the District Court and the Court of Appeals made an evaluation of the credibility of Plaintiffs' testimony and failed to permit the jury to exercise its proper function under the Seventh Amendment, *Lavender v. Kurn*, 327 U.S. 654 (1946); *Kridler v. Bituminous Casualty Corp.*, 409 F. 2d 88, 91 (5th Cir. 1969).

In these circumstances, it is important both to maintaining the right to trial by jury under the Constitution of the United States and to the enforcement of the antitrust laws by private civil actions that this Court grant this Petition For Certiorari and bring the decision of the instant case into harmony with its established precedents. The decisions of the courts below are so

clearly inconsistent with the established law that petitioners request this Court to grant an order summarily reversing the decision of the Court of Appeals and remanding this matter for trial before the District Court.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted and the decision of the Court of Appeals summarily reversed.

Respectfully submitted,

JAMES H. McCONOMY
JOHN McN. CRAMER
JOHN C. UNKOVIC
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pa. 15219

Attorneys for Petitioners.

June, 1973

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY DEAKTOR AND EDITH DEAKTOR, his wife, and **E. D. FOODS, INC.**, a Pennsylvania corporation,

Plaintiffs,

v.

FOX GROCERY COMPANY, a Pennsylvania corporation, and **JOHN F. FOX**,

Defendants.

Civil Action No. 68-542

OPINION AND ORDER

BARRON P. McCUNE, District Judge
October 12, 1971.

This action was commenced on May 15, 1968, by Harry and Edith Deaktor as individual plaintiffs and derivatively on behalf of E. D. Foods, Inc., a Pennsylvania corporation in which the individual plaintiffs are minority shareholders within the comprehension of Rule 23.1 of the Federal Rules of Civil

Procedure.[1] Defendants are Fox Grocery Company, a Pennsylvania Corporation and its controlling stockholder, John F. Fox. The complaint charges violations of the United States anti-trust and securities laws, common law fraud and breach of fiduciary duty. Jurisdiction is conferred on this court by 15 U.S.C.A. §§ 15, and 78aa and the doctrine of pendent jurisdiction. The parties have completed discovery and filed their pretrial narrative statements. What is presently before us are defendants' motions for summary disposition.

The complaint in this case contains five counts. The individual defendant has moved for judgment on all of them. The corporate defendant has moved for judgment against the individual plaintiffs on Count I, and for judgment against both individual and corporate plaintiffs on Counts III, IV, and V. There is also a motion to dismiss Counts I and II as to both defendants' for failure to state a claim.

Count I of the complaint alleges anti-trust violations under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. Count II alleges consequential damage to the individual plaintiffs as a result of the alleged anti-trust violations. Count III alleges a purchase of stock in violation of 15 U.S.C.A. §78j and Rule 10 (b) (5). Count IV is a common-law fraud count. Count V alleges a breach of the fiduciary duty owed by a majority shareholder to minority shareholders, and the corporation.

---

1 Rule 23.1. Derivative Actions by Shareholders

"In a derivative action brought by one or more shareholders . . . to enforce a right of a corporation . . ., the corporation . . . having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege *(1)* that the plaintiff was a shareholder . . . and *(2)* that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . , and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association . . . ."

The individual plaintiff Harry Deaktor had for some years prior to 1967 been engaged in the food supermarket business. During the 1950's he had been an executive with Star Markets. He subsequently acted as a supermarket consultant and for several years had an interest in a store known as the Squirrel Hill Food Farm.

The records of this case show that in November of 1966 all plaintiffs entered into an agreement with the corporate defendant (Fox Grocery), the object of which was to bring about the operation of a supermarket to be known as Deaktor's Foodland. "Foodland" is a trademark franchised in this jurisdiction by Fox Grocery.

The agreement states that the plaintiffs were unable to obtain proper bank financing without Fox Grocery's guaranty. The parties agreed that the Deaktors would pay into the corporate plaintiff (E. D. Foods), $14,700.00 for 49% of its stock. Additionally, the Deaktors would loan E. D. Foods $10,300.00. Fox Grocery was to pay into E. D. Foods $15,300.00 for the remaining 51% of its stock. Once this $40,300.00 had been paid into E. D. Foods, Fox Grocery agreed to sublease certain premises to E. D. Foods for use as a supermarket.

In order to finance the operation initially, the Deaktors and Fox Grocery agreed to join in guaranteeing a loan to E. D. Foods by a banking institution for the amount of $314,000.00. The Deaktors agreed to indemnify and hold Fox Grocery harmless from any and all liability incurred by it on account of its guarantee to the aforementioned banking institution.

The Deaktors and E. D. Foods agreed to enter into a Foodland Franchise agreement with Fox and to maintain that agreement until the $314,000.00 loan was paid.

The operation of E. D. Foods was to be carried out by the Deaktors with the supervision and assistance of Fox Grocery.

The agreement required Fox Grocery to use its best efforts to aid the operation of E. D. Foods. The agreement also provided that if E. D. Foods on or after one year "from the date hereof, [November 23, 1966] does not have a net profit of 1% on sales before taxes," then Fox Grocery may elect to take over operation of E. D. Foods or in lieu of the said takeover, "purchase from [the Deaktors] their forty-nine percent (49%) of the stock of said corporation at the then book value and thereafter [the Deaktors] shall have no interest in the corporation."

It appears that the agreement was executed in all respects. In March of 1968 Fox purported to assume 100% ownership of E. D. Foods, Inc., asserting that E. D. Foods had failed to earn 1% on gross sales before taxes. Shortly thereafter plaintiffs commenced this action.

The initial motion of defendants asked first for judgment in favor of John F. Fox on all counts, second for judgment against the individual plaintiffs and in favor of Fox Grocery on Count I and finally for judgment against both the individual and corporate plaintiffs and in favor of Fox Grocery on Counts III, IV and V. Subsequently in their supplemental brief in support of their motion, the defendants argue for dismissal of Counts I and II as against both defendants for failure to state a claim upon which relief may be granted. This appears to be a motion to dismiss under Rule 12 (b) (6)[2] and we believe clarity will be served by styling it as such.[3] On oral argument plaintiff objected to the motion to dismiss in that it was not contained in the original motion for summary judgment. While plaintiff's objection to this mixed procedure is understandable, we note that plaintiffs briefed and argued both the motion to dismiss and the motion for summary judgment. We therefore conclude that both motions are in a posture for disposition.

---

2 Fed. R. of Civ. P. Rule 12(b) (6).

3 The lack of substantive importance to be attached to the title given such a motion is discussed in 6 Moore, Federal Practice, ¶56.02 (3) (2d ed. 1966).

I. MOTION TO DISMISS COUNTS I AND II FOR FAILURE TO STATE A CLAIM

Defendants' objection to Count I is directed first at its failure to specify any conspirators other than John F. Fox and Fox Grocery Company. Defendants contend that Section 1 of the Sherman Act requires independent business entities as co-conspirators, that is to say that a corporation and its own officers cannot conspire to violate the antitrust laws. But we conclude that this issue does not really confront us. Defendants' position might have had merit at the time this suit was commenced. However a substantial record has accumulated since commencement. This record cannot be ignored and from an examination of this record it is obvious that plaintiffs contend that a conspiracy existed by and between Fox Grocery Company, John F. Fox, E. D. Foods, Inc., Harry Deaktor, Edith Deaktor and the various other Foodland stores.

Defendants do not seriously otherwise attack the sufficiency of Count I to allege an unlawful tying arrangement. In view of decisions such as Fortner Enterprises, Inc., v. United Steel Corp., 394 U.S. 495 (1969) (tying product credit) and Siegel v. Chicken Delight, Inc., 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd*, 1971 Trade Cas. ¶703 (9th Cir., Sept 9, 1971) (tying product trademark) we conclude that the complaint is sufficient in this regard.

Defendants do raise a question with regard to the charge in Count I of violations of Section 2 of the Sherman Act. They point to the absence of any averment that the defendants either monopolized or attempted to monopolize. We have examined the record of this case including plaintiffs' briefs and pretrial narrative. From these we must conclude that plaintiffs have not and do not intend to pursue any claim under Section 2 of the Sherman Act. With the exception of the pertinent statutory citation in the original complaint, plaintiffs have not elsewhere even alluded to any monopolization issue. We therefore conclude that these proceedings will be brought into better focus by dismissal of any claim under Section 2 of the Sherman Act as against both defendants. This will be done.

Count II of the complaint alleges that the individual plaintiffs suffered a loss of their income and investment as a consequence of the defendants' antitrust violations committed against the plaintiff corporation. In attacking Count II defendants rely principally on the Fifth Circuit's decision in Martens v. Barrett, 245 F. 2d 844 (5th Cir. 1957). In *Martens,* a corporation had been formed by two partners to operate their various businesses including a service station which was leased from Texaco. The two partners were the only stockholders in the corporation. After all their business activities were transferred to the corporation the partners were compensated by salary from the corporation. After two years of operation, Texaco refused to renew the lease of the station. The partners alleged that the refusal came as a result of their refusal to comply with an unlawful tying arrangement, specifically their corporation's refusal to carry certain of Texaco's accessory lines. The partners brought an action in their own right for losses they individually sustained as a consequence of Texaco's antitrust violations. Texaco's motion for summary judgment was granted. On appeal the Fifth Circuit, relying heavily on the decisions of the Third Circuit,[4] held:

> "... [I]t is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors, or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings lower salaries, bonuses, injury to general business reputation, diminution in the value of ownership." (footnotes omitted), Martens v. Barrett, 245 F. 2d 844 at 846.

That this doctrine, that injury to a corporation gives a cause of action only to the corporation, not its stockholders,

---

4 245 F. 2d 844 at 846 n. 5. See, particularly, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

remains vital is clear from the recent decision in Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727, 732-33 (3d Cir. 1970) (citing Loeb v. Eastman Kodak Co., 183 F. 704 with approval). In *Kauffman*, the court refused to make an exception to the rule for stockholders in mutual funds.

> "Conceding the basic vitality of this rule, appellee contends that the mutual fund is a novel corporate structure and that the unique relationship of the shareholder to the corporation confers upon the shareholder a primary right to redress harm to the fund. Since the redemptive value of a mutual fund share bears a direct relationship to the total net assets owned by the fund, the redemptive value is always directly affected by the net value of the total assets. Therefore, it is argued, when an injury to the fund threatens the value of the assets, the shareholder possesses a primary right to sue.
>
> "The difficulty we perceive in this approach is that it fails properly to appreciate, or seeks to ignore, the fundamental tenet of corporation law which treats the corporate body as an entity – indeed as a person – separate and distinct from those who own shares of its stock." Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727, 733.

We conclude that these decisions in *Martens* and *Kauffman* clearly establish that the shareholders and employees of a corporation have no claim for relief under the antitrust laws for injuries they suffer as a consequence of the injury done to a corporation by a defendant's conduct in violation of the antitrust laws. The claim of the individual plaintiffs in Count II seeks recovery under the antitrust laws for such consequential damage. We therefore hold that Count II does not state a claim for which relief can be granted. Count II is ordered dismissed as to both defendants.

II. DISMISSAL OF INDIVIDUAL CLAIMS OF THE DEAKTORS UNDER COUNT I

It is not completely clear from the pleading whether Count I was intended as a derivative action by minority shareholders. It is not explicitly called such. We note however the presence of the allegations required by Rule 23.1. We also note that the complaint is not verified as required by Rule 23.1. For the reasons we stated in connection with our disposition of Count II, we conclude that Count I, a claim under the antitrust laws, does not state a claim on behalf of the individual plaintiffs if it was ever intended as such.

We conclude that Count I is a shareholder's derivative suit and that it sufficiently meets all the requirements of Rule 23.1 except that of verification. We believe that the Supreme Court's decision in *Surowitz v. Hilton Hotels, Corp.*[5] sets the tone for construing the requirement for verification of complaints in derivative actions. The trial court in *Surowitz* had dismissed a derivative action when it was shown that the affiant, Mrs. Surowitz, did not even understand the complaint. She had executed the verification after being advised by her son-in-law that the matters in the complaint were probably true. The son-in-law, Irving Brillant, had conducted a thorough investigation which lead to the complaint. Mrs. Surowitz merely agreed to having the action brought in her name. The Supreme Court reversed. The Court viewed the ample evidence in the record that a thorough investigation had been conducted before the complaint was drafted as fulfilling the purpose of the requirement for verification.

In the instant case the defendants have deposed the individual plaintiff Harry Deaktor at length about the matters alleged in Count I. We feel this brings this case within the rationale of *Surowitz*. Requiring Mr. Deaktor to verify the complaint at this late date would be mere formalism.

---

5 383 U.S. 363 (1966).

III. LIABILITY OF JOHN F. FOX

Plaintiffs position as to John F. Fox's liability is that as an officer and director of Fox Grocery, he is individually liable for that corporation's wrongful acts when he was the agency through which those acts were committed. The defendants take the position that John F. Fox incurs no individual liability for wrongful acts of the corporation. In support of this position the defendant has cited a group of cases which have held that a corporate officer cannot conspire to violate the antitrust laws with his own corporation absent the participation of other independent business entities. Defendants argue that the facts of this case are within the rule of the cited cases. We believe our discussion of co-conspirators set out in connection with the motion to dismiss Count I for failure to state a claim applies here to the position of the individual defendant. The conspiracy asserted by plaintiffs was among Fox Grocery, John Fox, E. D. Foods, the Deaktors and other Foodland stores and their operators.

Defendant Fox appears to contend that he is not individually liable for antitrust violations or other tortious conduct when he commits such acts as an officer of the corporation on behalf of the corporation. We are unaware of any authority which would support such a theory. To the contrary, we believe it is well established that an agent is individually liable for torts committed by him pursuant to his agency, see, Restatement of Agency, 2d §343 (1957).

> "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . . ."

Under the antitrust laws the liability of the participating officers of the offending corporation has long been established, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

IV. MOTIONS OF BOTH DEFENDANTS AS TO COUNTS III, IV, AND V

A. COUNT III.

Defendants' motion for summary judgment as to the alleged violations of the Securities and Exchange Act asserts that there is no genuine material issue of fact as to the "materiality" of the alleged misrepresentations made by defendants.

As mentioned above the November 1966 Agreement of the parties provided that if E. D. Foods, Inc. on or after one year "from the date hereof does not have a net profit of 1% on sales before taxes," then Fox had the right to either take over operation of E. D. Foods, Inc., or "purchase from [the Deaktors] their forty-nine per cent (49%) of the stock of said Corporation at the then book value . . . ."

As per other provisions of the same agreement defendant Fox Grocery took care of E. D. Foods' bookkeeping. As part of this service, statements were sent to the Deaktors as the officers of E. D. Foods. The individual plaintiffs contend that these statements contained such substantial errors that they were materially misleading as to the amount of before tax profit earned by E. D. Foods. Plaintiffs further allege that defendant mislead them by representing that the relevant period for computation of the 1% before taxes figure was the first year of operation. Plaintiffs' contention is that the agreement should be read with an implied proviso that the initial year of operation should not be considered. Plaintiffs urge that it is not "commercially reasonable" to include the first year of operation in the computation of the 1% figure. In sum, the plaintiffs contend that the combination of the erroneous financial statements with the erroneous construction of the agreement constitutes material misrepresentation of fact upon which the plaintiffs relied, which reliance was reasonable in view of the relationship between the parties.

We fail to see any merit in plaintiffs' position that the language "on or after one year from the date hereof" is ambiguous. We can find no rational basis for plaintiffs' contention that commercial reasonableness requires the convoluting of this rather simple phrase to read "after one year of operation not including the first year of operation." There are certainly occasions when esoteric trade concepts require proof of meaning, such as in the *Hartol Petroleum Corp. v. Antelou Oil Co.*[6] case cited in plaintiffs' brief. But "on or after one year from the date hereof" is not such a phrase. Reasoning men could only read this as meaning one year from the date of the agreement, in this case from November 23rd, 1966.

Plaintiffs' contention that defendants made material misrepresentations therefore depends on whether the alleged bookkeeping errors were of sufficient magnitude that if corrected the accounts of the store would show a profit of 1% before taxes for the period up until, or after, November 23, 1967. The original complaint indicated that this was plaintiffs' theory. However, an examination of the record including the deposition of Mr. Deaktor and the pretrial narrative filed by plaintiffs clearly shows that plaintiffs admit that the store was always operated at a loss. Correction of the accounting errors only reduces the size of the losses. Since the elimination of the accounting errors does not affect defendants' right to exercise its option, these errors are immaterial to the purchase of plaintiffs' interest.

We conclude that there is no genuine issue of fact as to the issue of the materiality of the misrepresentations made to plaintiffs and therefore that the issue of materiality is properly dealt with by summary judgment. We hold the misrepresentations here asserted were not material.

Judgment will accordingly be entered in favor of both defendants as to Count III, the alleged violation of 15 U.S.C.A. §78j.

---

6 107 F. Supp. 373 (W.D. Pa. 1952).

B. EXERCISE OF PENDENT JURISDICTION AS TO COUNT IV.

In this exercise of pendent jurisdiction we have guidance of *United Mine Workers v. Gibbs*[7] and *Knuth v. Erie-Crawford Dairy Co-op.*[8] In *Gibbs* it was stated that:

> "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the Hurn [v. Oursler, 289 U.S. 238 (1933)] question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in Hurn, "little more than the equivalent of different epithets to characterize the same group of circumstances" [citation omitted].
>
> "This limited approach is unnecessarily grudging. Pendent jurisdiction in the sense of judicial *power* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ," US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. [citation omitted]. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is *power* in federal courts to hear the whole." (footnotes omitted) (emphasis in

7 383 U.S. 715 (1966).

8 395 F. 2d 420 (3d Cir. 1968).

> original), United Mine Workers v. Gibbs, 383 U.S. 715, 724-25.

The Court went on to describe the discretionary nature of pendent jurisdiction justification for which stems from convenience and fairness to the parties. Although not specifically confronted with the question the Court also noted that,

> "... if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, at 726.

This statement we think is particularly applicable to Count IV in view of our decision with regard to Count III. As previously noted Count IV is merely a statement of the common law claim related to the statutory federal securities law claim. The federal issue having been dismissed before trial we believe it would be inappropriate to retain jurisdiction over the related state claim. Count IV is therefore ordered dismissed as to both defendants.

C. EXERCISE OF PENDENT JURISDICTION AS TO COUNT V.

Count V is like Count IV attacked only on the theory that this court does not have jurisdiction under the doctrine of pendent jurisdiction. Count V relates to Count I. The theory of Count V would appear to be that the conduct of the defendants, particularly Fox Grocery, which arguably violated the antitrust laws, at a minimum constituted a breach of the fiduciary duty owed a corporation and its minority shareholders by a majority shareholder.[9] We believe that to dismiss Count V would be contrary to the instruction of *Gibbs* and would be an abuse of our discretion. Therefore the motions of both defendants to dismiss Count V are denied.

---

9 See, Speed v. Transamerica, 99 F. Supp. 808 at 849 (D. Del. 1951).

V. SUMMARY

In the interest of clarity we will summarize our action and its results. We have left for consideration at trial the following:

a. Count I – a derivative suit by minority shareholders on behalf of their corporation against John F. Fox and Fox Grocery Company for violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

b. Count V – an action by Harry and Edith Deaktor in their own right and derivatively on behalf of their corporation against John F. Fox and Fox Grocery Company for breach of fiduciary duties owed by a majority stockholder to a corporation and its minority stockholders.

c. Count II – is ordered dismissed as to both defendants for failure to state a claim upon which relief may be granted.

d. Count IV – is ordered dismissed as a discretionary matter.

e. The motions of both defendants for summary judgment are granted as to Count III.

This opinion will constitute our Order.

/S/ Barron P. McCune

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY DEAKTOR AND EDITH DEAKTOR, his wife, and **E. D. FOODS, INC.**, a Pennsylvania corporation,

Plaintiffs,

v.

FOX GROCERY COMPANY, a Pennsylvania corporation, and **JOHN F. FOX**,

Defendants.

Civil Action No. 68-542

TRIAL FEBRUARY 14, 1972

ORAL DECISION ON MOTION FOR DIRECTED VERDICT

(In open court.)

THE COURT: Let the record show that we have been in recess since about 11:30 while the Court considered the motions that were filed by the Defendant at the end of the Plaintiffs' case.

Gentlemen, I have thoroughly considered your briefs and your arguments; they are very good. Both counsel have been very assiduous and very capable.

The ruling of the Court on the motion for directed verdict is as follows:

Oral decision on Motion for Directed Verdict.

The motion for a directed verdict is granted as to Count No. 1 and refused as to Count No. 5 of the complaint.

We agree with the Defendant that as to Count No. 1 the evidence as to causal connection between the alleged antitrust violations and the damages which it is alleged that E. D. Foods suffered is too speculative to submit to the jury, and that the evidence as to the alleged damages suffered by E. D. Foods is too speculative to submit to the jury. We find, in other words, that the derivative action brought in behalf of E. D. Foods must fail for the reasons stated. However, the damages claimed by Count No. 5 are not so speculative, nor is the causal connection so speculative in this count. In Count 5 there are more than alleged antitrust violations involved. The Defendant, as we understand the testimony, undertook to render accounting services and advice and certain types of aid, and even, perhaps, supervision. The question arises whether the Defendant, the majority stockholder, properly rendered this service, and, if not, were the Plaintiffs individually mislead or caused to rest and become less vigilant or caused to fail to take action which might have permitted them to make money, or to make a profit, an equivalent to the one percent contemplated by the agreement.

If there was a breach of fiduciary duty, the damages as claimed by the Plaintiffs individually are not speculative in our view but are, on the other hand definite; they would be the money invested in the 49 percent of the corporation stock.

In other words, the alleged antitrust violations, taken in connection with the other undertakings of the Defendant, as evidenced by the agreements and the testimony, may have caused a failure by E. D. Foods to make a profit and damages in this case we do not think would be speculative.

It is our understanding that our reasons for directing a verdict should be set forth. They have been, very briefly, from the bench, and we will enlarge upon them at a later time. This ends the rulings.

Judgment to be Entered in Favor of Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY DEAKTOR AND EDITH DEAKTOR, his wife, and **E. D. FOODS, INC.**, a Pennsylvania corporation,

Plaintiffs,

v.

FOX GROCERY COMPANY, a Pennsylvania corporation, and **JOHN F. FOX**,

Defendants.

Civil Action No. 68-542

ORDER OF COURT

AND NOW This 1st day of March, 1972, the court having expressly determined that there is no just reason for delay, it hereby expressly directs the entry of final judgment in favor of Defendants, John F. Fox and Fox Grocery Company with regard to Counts I through IV inclusive of the Complaint in the above-captioned matter. Count V is hereby severed and the trial thereof continued.

BY THE COURT

/S/ McCune

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 72-1327

HARRY DEAKTOR and **EDITH DEAKTOR**, and **E. D. FOODS, INC.**, a Pennsylvania corporation,

Plaintiffs, Appellants,

v.

FOX GROCERY COMPANY, a Penna. corporation, and **JOHN F. FOX**,

Defendants, Appellees.

Appeal From the Order of the United States District Court for the Western District of Pennsylvania Directing the Entry of Final Judgment With Regard to Counts I through IV Inclusive at Civil Action No. 68-542

Argued Tuesday, February 13, 1973

Before: **VAN DUSEN** and **ADAMS**, *Circuit Judges*, and **BRODERICK**, *District Judge*

OPINION OF THE COURT

(Filed March 27, 1973)

Opinion of the Court of Appeals.

ADAMS, *Circuit Judge*

The basic issue on this appeal is whether plaintiffs' evidence regarding damages was adequate to support a claim for alleged antitrust violations.

Fox Grocery Company (Fox), franchisor of retail supermarkets doing business under the "Foodland" name in Western Pennsylvania, discussed with Harry Deaktor, an experienced supermarket operator, the possibility of opening a Foodland franchise store, in the Squirrel Hill section of Pittsburgh, under the management of Mr. Deaktor. E. D. Foods, Inc. was formed to operate the proposed supermarket, and in November, 1966, Harry Deaktor and his wife Edith signed an agreement prepared by Fox dealing with the ownership of E. D. Foods, Inc. and the operation of the store.

Under the agreement, the supermarket was financed by an investment by the Deaktors of $14,700. for 49% of the issued stock, and an investment of $15,300. provided by Fox for 51% of the issued stock. The Deaktors also lent E. D. Foods, Inc. $6,300. in cash and approximately $6,000. worth of equipment. Substantial corporate borrowings were secured by the guaranty of Fox and the Deaktors and by a pledge of the Deaktors' assets. The agreement provided in part that if after one year E. D. Foods, Inc. did not show a net profit of 1% on sales before taxes, Fox had the right, among other alternatives, to purchase the Deaktors' stock in the corporation at its then book value.

The supermarket was opened on November 30, 1966. On March 17, 1968, Fox advised the Deaktors that because the store had failed to produce a 1% net profit, as provided by the agreement, it was exercising the option to purchase the Deaktors' stock.

Suit was brought in the district court by the Deaktors individually and derivately on behalf of E. D. Foods, Inc. against Fox and its president, John Fox. The complaint contained five counts:

I. Derivative action on behalf of E. D. Foods, Inc. for alleged violations of the antitrust laws, including price-fixing and tie-in sales.

II. Action on behalf of Harry and Edith Deaktor for damages allegedly caused to them by the same alleged antitrust law violations.

III. Action on behalf of Harry and Edith Deaktor for violation of Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j (b), and Rule 10b-5 of the Securities and Exchange Commission by the alleged publication of false and misleading information in connection with the acquisition of the Deaktors' stock in E. D. Foods, Inc, by Fox.

IV. Action on behalf of Harry and Edith Deaktor for alleged common law fraud on the same facts as Count III.

V. Action on behalf of Harry and Edith Deaktor for alleged breach of the fiduciary duty owed a minority shareholder by a majority shareholder based upon the alleged antitrust violations in Counts I and II.

After extensive discovery, both defendants moved for summary judgment or dismissal of the complaint. By opinion and order dated October 12, 1971, the district court dismissed Count II of the complaint for failure to state a claim upon which relief can be granted, granted summary judgment for the defendants on Count III, and dismissed Count IV, which was grounded upon pendent jurisdiction, as a discretionary matter.

The case came on for jury trial in February, 1972 on Counts I and V of the complaint. At the conclusion of the plaintiffs' evidence, the court granted the defendants' motion for a directed verdict as to Count I on the alternative grounds that "the evidence as to causal connection between the alleged antitrust violations and the damages which it is alleged that E. D. Foods suffered is too speculative to submit to the jury, and

that the evidence as to the alleged damages suffered by E. D. Foods is too speculative to submit to the jury."[1]

Having carefully examined the record below and considered the contentions presented in briefs and at oral argument, we affirm the judgment of the district court.

There was clearly no error committed by the district court's actions concerning Counts II, III, and IV of the complaint. Count II sought relief on behalf of the Deaktors individually for damages allegedly caused to them (loss of income and loss of equity investment) by Fox's alleged antitrust violations. This Court's decision in Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), established that shareholders of a corporation, *qua* shareholders, have no antitrust claim for harm suffered as a consequence of injury to the corporation allegedly caused by a defendant's conduct in violation of the antitrust laws. The Deaktors argue that the *Kauffman* principle is inapplicable to the present case because they are seeking relief for injury caused directly to them, not for injury *caused* to E. D. Foods, Inc. It is unnecessary, however, for this Court to examine the implications of this proffered distinction, for the district court's disposition of Count II must be affirmed in any event.

The basis for the Deaktors' claim that they were personally and directly injured by Fox's alleged antitrust violations is the contention that Fox's conduct *caused* the failure of the supermarket to produce a 1% net profit, thus triggering Fox's right to purchase the Deaktors' stock and thereby depriving them of their income and equity investment. As the district court concluded, and as this Court holds today, *infra*, the Deaktors were unable to demonstrate satisfactorily in support of Count I, which rests upon the same contention as that urged to uphold

---

1 The district court denied defendants' motion for a directed verdict as to Count V. On joint motion of both parties, the court continued the hearing of Count V until decision by this Court of the present appeal. Under these circumstances, we intimate no view concerning the issues raised by Count V, except to note that the potential liability of the individual plaintiffs on their guarantees made to secure the borrowings of E. D. Foods, Inc. may be covered by this Count.

Count II, that Fox's activity caused the financial losses of Deaktor's Foodland. Under these circumstances, it would serve no purpose, even assuming a distinction between this case and *Kauffman,* to remand this case to the district court to enable plaintiffs to endeavor to prove that which they have already failed to establish.

With respect to Count III of the complaint, the district court held that even assuming misrepresentations (accounting errors) regarding Fox's purchase of the Deaktors' stock, such were not material and, thus, not actionable under Rule 10b-5 of the Securities and Exchange Commission. 17 C.F.R. §240.10-5. The parties disagreed as to the relevant date from which the agreement's one-year period commenced in determining whether the store was operating at a 1% net profit. The district court committed no error in concluding that the provision, "on or after one year from the date hereof," meant on or after one year from the date of the agreement. Because, as the Deaktors conceded, the store always operated at a loss, any alleged accounting errors could at most have varied the amount of the store's loss and, if corrected, would not have placed the supermarket above the 1% net profit figure. Therefore, such errors, even if they existed, were not material.

The district court's ruling as to Count IV must also be affirmed. Pendent jurisdiction for this common law fraud claim depends upon the relationship between the facts alleged in support of Count III and those alleged in Count IV.[2] To the extent that Count IV is based upon the same facts as those alleged in support of Count III, the district court's conclusion as to the immateriality of any alleged accounting errors, which we affirm, *supra,* serves as an adequate foundation for the rejection of both claims, since materiality is an essential element of common law fraud. To the degree that Count IV is based on

2 Under the doctrine of pendent jurisdiction, federal courts have *power* to adjudicate claims based upon state law whenever there is a substantial federal claim "and the relationship between it and the state law claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Exercise* of the power is discretionary and depends upon such considerations as judicial economy, convenience, and fairness to the litigants. *Id.* at 726.

facts *different* from those alleged in support of Count III, *(1)* if those facts are still sufficiently similar to conclude that only one constitutional "case," under the United Mine Workers v. Gibbs principle, fn. 2, *supra*, is presented,[3] we hold that the district court did not abuse its discretion in dismissing Count IV, and *(2)* if the facts are sufficiently different so as not to present one constitutional "case," we conclude that the district court lacked *power* to adjudicate the Count IV claim. Upon these alternative bases, therefore, we affirm the district court's disposition of Count IV.

The primary thrust of the Deaktors' argument on appeal has been directed toward the issues underlying Count I of the complaint. Mr. Deaktor testified that Fox required Deaktor's Foodland to sell at suggested retail prices. He also testified that the store was required, as a condition of obtaining a Foodland franchise and of not having to pay higher rent, to purchase products exclusively from Fox Grocery Company. Price-fixing and tie-ins, if proved, are illegal under the antitrust laws. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (tie-in); Albrecht v. Herald Co., 390 U.S. 145 (1968) (maximum price-fixing); Siegal v. Chicken Delight, Inc., 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (tie-in). In order to recover under the antitrust laws, however, a plaintiff must, in addition to demonstrating an antitrust violation, prove: *(1)* a causal relationship between the antitrust violation and the alleged injury, and *(2)* measurable damage to his business or property.

Even assuming that the Deaktors have satisfied their burden of proving that Fox was engaged in price-fixing and tie-in sales, after our own independent examination of the record we cannot say that the district court erred in concluding that the plaintiffs' evidence on damages was too speculative to send to the jury.

The Deaktors' theory of recovery is that the prices fixed by Fox for the Foodland stores were too low and the cost of

---

3 *See id.* at 725.

merchandise tied to the Foodland franchise and the low rent too high to realize a net profit. Plaintiffs' sole witness on the amount of damages was Harry Deaktor, who testified that if he had been permitted to buy meat from a relative and produce directly from the produce yards, and to raise the store's selling prices by 2 or 3%, in his opinion, Deaktor's Foodland would have realized a *gross* profit of 21%. Other than the unsupported statement that *net* profit would have increased in the same amount as gross profit, the record was barren of evidence concerning net profit. Furthermore, the 21% gross profit figure itself was characterized by Mr. Deaktor as an "objective" and a "goal." Mr. Deaktor's testimony was ambiguous concerning the supermarket's competitors, the extent to which he would have been able to raise prices absent Fox's alleged price-fixing, and the relevant cost figures necessary to determine net profit. Plaintiffs' failure to produce evidence concerning the factors essential to establish net profit as opposed to gross profit, in effect, meant that the jury would have had to speculate as to the amount of damages. The district court committed no error in concluding that plaintiffs did not meet their burden of establishing the quantum of damages.[4]

In addition, the plaintiffs' causation theory was conjectural. Their own expert witness, Professor Applebaum, testified regarding the various reasons that might cause a retail supermarket to be unprofitable, but assigned no specific cause for the financial losses of Deaktor's Foodland. The district court did not err in concluding that, based upon Professor Applebaum's and Mr. Deaktor's testimony, the evidence concerning causation was speculative.

An order will be entered affirming the judgment of the district court. Costs taxed against appellant.

---

4 In this regard, it is appropriate to note that plaintiffs' failure to satisfy their burden of proving the amount of damages "was so only because [they] chose to rely almost entirely on one expert witness and one lay witness for [their] proof of damages. Any inadequacy which may have resulted should be attributed to [plaintiffs'] own presentation of [their] case rather than to the law or the court's application of it here." Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F. 2d 61, 83-84 (1st Cir. 1969).

TO THE CLERK:

Please file the foregoing opinion.

/S/ Arlin M. Adams
Circuit Judge

March 27, 1973.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 72-1327

HARRY DEAKTOR and **EDITH DEAKTOR**,
his wife and **E. D. FOODS, INC.**,
a Pennsylvania corporation,

Appellants

v.

FOX GROCERY CO., a Pennsylvania
corporation and **JOHN F. FOX**
(D. C. Civil Action No. 68-542)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: **VAN DUSEN** and **ADAMS**, Circuit Judges and **BRODERICK**,
District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 1, 1972, be, and the same is hereby affirmed, Costs are taxed against appellants.

ATTEST:
/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

March 27, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 72-1327

HARRY DEAKTOR and **EDITH DEAKTOR**, his wife and **E. D. FOODS, INC.**, a Pennsylvania corporation,

Plaintiffs, Appellants

v.

FOX GROCERY COMPANY, a Penna. corporation and **JOHN F. FOX**,

Defendants, Appellees
(D. C. Civil Action No. 68-542)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS,* Circuit Judges and BRODERICK, District Judge

The petition for rehearing filed by **HARRY DEAKTOR** and **EDITH DEAKTOR**, and **E. D. FOODS, INC.**, Plaintiffs, Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: May 2, 1973

*Judge Weis requested that he be recused.

APPENDIX B

CONSTITUTION OF THE UNITED STATES
AMENDMENT VII–CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

THE SHERMAN ANTITRUST ACT
(15 U.S.C. §1)

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:

THE CLAYTON ACT
(15 U.S.C. § 14)

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Statutory Provision.

THE CLAYTON ACT
(15 U.S.C. § 15)

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.